Supreme Court, U.S.
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IN THE
Supreme Court of the United States
October Term, 2001

No. _____

MARVIS JETT,

Petitioner,

vs.

WASHINGTON COUNTY SCHOOL BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the demotion and reduction in salary from a twenty-seven (27) year secretarial position to a Teacher's Aide position, allow the demoted secretary to resurrect time barred claims of disparate treatment under the continuing violation theory, that began five years earlier when her secretarial duties were replaced with Teacher's Aide duties?

Whether the time limitation as set forth in 42 U.S.C. § 2000e-5(e) is satisfied, sufficient to invoke the continuing violation theory, if at least one unlawful employment practice occurred within 300 days of the filing of a charge of discrimination.

Whether the applicability of a continuing violation, in the absence of substantive law, is a factual determination to be made by the jury.

Whether, after a jury verdict for the Plaintiff in a race discrimination case, it proper for the Appellant Court to review whether the Plaintiff established a prima facie case and reverse the jury verdict on that basis.

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1 (b) of the Rules of the Supreme Court of the United States.

1. Marvis Jett, Plaintiff/Appellee;

2. Washington County School Board, Defendants/Appellant;

3. Carolyn Davis Cummings, Attorney for the Plaintiff/Appellee; and

4. William R. Mabile, III, Attorney for the Defendant/Appellant.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Marvis Jett, (hereinafter Jett) respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered February 1, 2001 in Case No. 00-11554, Marvis Jett v. Washington County School Board.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is unreported. It is attached as an appendix, p. A1.

JURISDICTION

This Court has jurisdiction to review the decision of the Court of Appeals entered February 1, 2001. Petitioner's petition for rehearing with suggestion for rehearing en banc was denied March 14, 2001, a copy of which is attached at Appendix, p. A13. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C.

Section 1254 (1).

STATUTORY PROVISION INVOLVED

The statute construed is Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), et seq., which says: "It shall be unlawful practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; and 42 U.S.C. § 2000e-5(e) which provides that a charge of discrimination must be filed within 300 days after the alleged unlawful employment practice occurred. The pertinent sections of the statute are set forth at Appendix, p. A 14.

STATEMENT

A jury in the Northern District of Florida found that Jett was transferred and demoted because of her race. Pursuant to the jury verdict, the District Court for the Northern District of Florida entered an Amended Judgment dated February 25, 2000. A copy of the judgment is appended hereto at Appendix, p. A1.

The Unites States Court of Appeals for the Eleventh Circuit reversed, and held: (1) that the Plaintiff's claim with respect to her job transfers was barred by the statute of limitations because she did not file a timely charge of discrimination; and (2) the Plaintiff failed to establish a prima facie case of discrimination with respect to the commensurate salary policy. The opinion of the Court of Appeals which reversed the jury verdict is dated February 1, 2001 and is unpublished. A copy of the opinion is attached hereto at Appendix, p. A1.

(FACTS)

This is an action brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(e), et seq., by Petitioner, Marvis Jett (hereinafter Jett) to recover seniority, back pay, loss benefits and for pain, suffering and emotional distress. Jett had worked for Respondent, Washington County School Board, (hereinafter School Board), for twenty-two (22) years as the only

black secretary in the District Office and with more seniority than any of the other eight secretaries in the District Office, until she was selected to be moved out of the office in 1989, allegedly because of reassignment of duties and because of the need for fewer secretaries. Thereafter, Jett was demoted to a Teachers' Aide position in 1994, at age fifty-five (55). From 1989 to 1994, Jett was required to work in menial positions performing the task of a Teachers' Aide. In 1990 and 1992 she was transferred from one menial task in a hostile environment to another menial task. During the period of being shifted from place to place, Jett remained a secretary in title, salary and benefits until July 1994, when she was ultimately demoted. The School Board claimed Jett was demoted because of the adoption of a new policy that gave it the authority to pay employees commensurate with their job duties and responsibilities.[1]

In 1989, after the School Board promised not to reduce her salary to a Teacher's Aide salary but to place her in a lateral transfer status,[2] Jett did not file a charge with the Equal Employment Opportunity Commission or with any other state agency protesting her removal from the District Office. Jett's efforts to be returned to a secretarial position included speaking with two different School Superintendents on numerous occasions doing the period from 1989 to 1994, and both represented that they were looking out for her and would consider placing her back in a secretarial position when a vacancy occurred.

At the time the policy was adopted, the School Board knew that Jett would suffer a salary reduction and was aware that she was the only secretary who was performing the duties of a Teacher's Aide. Before the effective date of the policy, Jett appeared before the School Board and requested that her salary not be reduced, as the School Board had promised to maintain her secretarial salary as a lateral transfer, five years earlier. Jett was not successful. When the policy became effective, Jett's salary was reduced from

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[1] In July 1993, the School Board adopted a policy, effective July 1, 1994, who purportedly gave it the authority to pay employees who had been demoted or transferred, commensurate with the position to which they had been demoted or transferred to.

[2] The policy utilized by the Respondent at the time defined a lateral transfer of non-instructional/support personnel as the movement from one position to another which does not have a subsequent change in salary.

approximately $17, 881 annually to $12,171 annually. No other secretary was immediately affected by the policy.

On July 24, 1994, approximately five years after her involuntary removal from the District Office, Jett filed a charge of discrimination pursuant to Title VII of the Civil Rights Act of 1964, as amended. Jett complained that she was demoted and discriminated against in the terms and conditions of employment. On July 14, 1998, the Equal Employment Opportunity Commission issued Jett a "right to sue" letter and on October 13, 1998, this lawsuit was filed in the Fourteenth Judicial Circuit Court in Washington County, Florida. On January 20, 1998, the School Board filed a Notice of Removal of the complaint from State Court to the United States District Court for the Northern District of Florida.

On June 19, 1999, Jett filed an amended complaint in which she alleged to have been continuously discriminated against on the basis of race, when the School Board removed her from the District Office in 1989 and required her to perform duties of various lesser positions in hostile environments, while no other white secretaries were similarly treated. Jett's complaint also alleged that the School Board was aware that she was the only secretary who had been reassigned to perform duties of a position with lower pay when the salary policy was adopted.

On June 23, 1999 the School Board moved for Summary Judgment, taking among other positions that Jett did not file a timely charge of discrimination and that she could not establish a prima facie case with regards to the application of the salary policy.

In response to the Summary Judgment motion, Jett asserted that the School Board carried on a discriminatory employment practice against her on the basis of race beginning in 1989, which was ongoing and continuous and that her complaint should be deemed timely because there was a substantial nexus between the School Board's assigning her to perform Teacher's Aide duties beginning in 1989, the subsequent transfers and her ultimate demotion to the Teacher's Aide position in 1994.

Jett raised equitable estoppel and equitable tolling as other relevant principles for tolling the statute of limitations. Jett alleged she was induced to her detriment, not to file a complaint of discrimination by the Respondent, when in 1989, she was promised that he salary would remain at the same level. Jett urged that even

while being subjected to uncertainty about job assignments, it was too much to expect her to file an action during the period that she believed she was secure in her title and salary. On October 8, 1999 the District Court entered an Order denying the School Board's Motion for Summary Judgment.

At trial, Jett established that from 1989 to 1994, the School Board voted continuously annually to assign her to perform Teacher's Aide duties and responsibilities, while no other white secretaries were assigned such duties or voted on annually. Jett also introduced evidence which questioned whether the authority to adjust salaries commensurate with duties and responsibilities was the reason behind the adoption of the 1994 policy, because the School Board already had the authority and was exercising the authority to adjust salaries commensurate with duties and responsibilities, prior to the adoption of the policy. The unrefuted evidence at trial showed that other School Board employees had been demoted for cause, with salary reductions to their demoted positions in 1989 and 1992. The School Board's Representative also testified that school principals had been transferred to other administrative positions with salary adjustments, prior to the effective date of the 1994 policy. The evidence also showed that after the adoption of the policy, there was at least one white School Board employee who did not suffer a salary reduction after being demoted to a lower position.

On October 20, 1999 the jury returned a verdict for Jett and awarded her a total of $134,000 which included $34,000 for back pay, $14,000 for lost benefits and $86,000 for pain and suffering.

On appeal to the United States Court of Appeal for the Eleventh Circuit, the School Board took the position that the District Court erred by not granting its summary judgment motion and its motion for judgment notwithstanding the verdict, regarding Jett's transfers, because neither the continuous violation theory nor equitable principles saved Jett's time-barred claims. The School Board argued the lack of a substantial nexus between Jett's transfers and the salary policy sufficient to trigger the continuous violation theory, and furthermore that the salary policy did not make permanent any allegedly discriminatory act concerning Jett's transfers.

Nevertheless, the School Board agreed that Jett's charge was timely regarding the salary policy but argued that she had not established a prima facie case of racial discrimination because

similarly situated white persons were also affected by the salary policy.

Jett's position before the Court of Appeals was the same as had been advanced before the District Court; i.e. the School Board's summary judgment and judgment notwithstanding the verdict motions were properly denied because Jett established equitable reasons for tolling the statute of limitations. The School Board was estopped from raising the statute of limitations as a bar because the 1989 decision not to reduce her salary was designed to prevent her from filing a charge of discrimination. She was actively misled with the maintenance of her secretarial salary for five (5) years and with promises of being placed back into a secretarial position during the same period that the School Board maintained her secretarial salary.

Furthermore, the elements of similarity, frequency and permanency were sufficiently present to trigger the continuing violation theory and thus, provide the necessary nexus between her time-barred transfers to Teachers' Aide duties and her timely charge regarding being demoted to the Teacher's Aide position. Indeed, Jett advanced the position that the salary policy and her ultimate demotion made permanent the School Board's discriminatory actions against her for five (5) years which mandated annually that she perform the duties of a Teacher's Aide. Additionally, Jett emphasized that a prima facie case of disparate treatment as well as pretext had been established with regards to the salary policy because (1) the School Board admitted that of the six white employees it advanced to demonstrate reductions due to the salary policy just as Jett, that all of them could not attribute their salary reductions to the policy in question; and (2) there was at least one white employee who was demoted to a lesser position but suffered no salary reduction.[3]

On February 1, 2001, a panel of three judges from the Court of Appeals for the Eleventh Circuit reversed the jury verdict and ordered dismissal of Jett's case with prejudice. The panel concluded with regards to equitable tolling and equitable estoppel: "The fact that Jett backed off from her threat to file a charge of discrimination after being allowed to keep her salary in no way

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[3] The jury heard testimony that one white male, Jerry Tyre's salary remained the same after he was demoted from Principal, a higher paying job, to director of Transportation. (Doc. 84 pg. 16-17).

means she was mislead about her legal rights or ability to file a charge....[t]his Court determines that the limitations period was not tolled for this entire period and the charge filed on July 27, 1994 was untimely with respects to her demotion and transfers."[4] Thereafter, the court did not address Jett's "continuous violation" claim of being a victim of the School Board's past, current and continuing discriminatory practices against her nor did it address her claims that the past discrimination had been perpetuated by the adoption of the facially neutral current salary policy.

The panel also found that the district judge erred in holding that Jett had proven the elements of a prima facie case, concluding that "[s]he failed to show that the Board treated similarly situated white employees differently. Further, the panel opined: "Even if Jett had proven the elements of a prima facie case, the district judge was still required to grant summary judgment (or later judgment as a matter of law) on Jett's commensurate salary claim since the Board articulated a legitimate nondiscriminatory reason for its adoption of the policy and Jett did not show that the reason was pretexual."

Jett petitioned the Court for rehearing and rehearing en banc on February 22, 2001. That petition was rejected on March 14, 2001. Jett now brings this petition for a writ of certiorari within ninety (90) days from the date the request for rehearing was denied.

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[4]The panel made a factual error when it deemed Jett to have been demoted when she was transferred in 1989, when her demotion was effective July 1, 1994, pursuant to a vote of the Board July, 1993.

REASONS THE WRIT SHOULD BE GRANTED

I. THIS COURT SHOULD GRANT CERTIORARI SINCE THE DECISION BELOW DEMONSTRATES CONFUSION AND LACK OF UNIFORMITY AMONG THE CIRCUITS REGARDING THE APPLICATION OF THE CONTINUING VIOLATION THEORY AND THE ELEMENTS NECESSARY TO SUCCESSFULLY CHALLENGE ONGOING DISCRIMINATORY POLICIES AND PRACTICES THAT HAVE A NEXUS TO VIOLATIONS WITHIN THE CHARGE FILING PERIOD.

The continuous violations theory is a judicially created theory that suspends the commencement of the applicable charge filing period if a defendant's violation of the law is deemed to be continuing in nature. Application of the theory allows a Plaintiff to reach back and get relief for actions of discrimination that occurred outside the statute of limitations period by linking it as one continuous act, with a discriminatory act that took place within the limitation period. *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S. Ct. 1885, 52 L. Ed. 2d 571 (1977).

Section 2000e-5 (e)(1) (1997) of Title 42 allows a charging party 300 days from the date of the alleged unlawful practice to file a charge with the Equal Employment Opportunity Commission, when the party has also timely filed with a proper state agency. The Eleventh Circuit determined that since Jett was transferred and demoted in 1989, her charge filed with the state agency on July 27, 1994, just fifty-five (55) days after the School Board notified her in writing of her reduction to a Teacher's Aide salary, was untimely.[5] By reaching this conclusion, the Eleventh Circuit totally ignored the facts and documents in the record, erroneously concluded that Jett failed to timely file and failed to consider the discriminatory action of reducing her salary by thousands of dollars, which action was clearly within the charge filing period.

With regards to facts necessary to sustain a charge of

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[5] The School Board letter dated June 2, 1994, which notified Jett of her demotion, salary reduction, loss of annual leave and reduction in annual work days to a 196 day contract was part of Jett's evidence that was admitted at trial, and is included in the Appendix, p. A16.

continuing violation that would address present effects of past discrimination, this Court has observed that the emphasis should not be placed on mere continuity; the critical question is whether any present violation exists: "[t]he proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful....the emphasis is not upon the effects of earlier decisions; rather, it is upon whether any present violation exists." *Delaware State College v. Ricks*, 449 U.S. 250, 258, 101 S. Ct. 498, 66 L. Ed. 2d. 431 (1980), citing *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S. Ct. 1885, 52 L. Ed. 2d 571 (1977).

In determining whether a discriminatory employment practice constitutes a continuing violation, the Eleventh Circuit distinguishes between the present consequence of a one time violation, which does not extend the limitation period, and the continuation of that violation into the present, which does. *Carter v. West Publishing Company*, 225 F. 3d 1258, 1263 (11th Cir. 2000); See also *Ross v. Buckeye Cellulose*, 980 F. 2d 648 (11th Cir. 1993). Even applying the method generally observed by the Eleventh Circuit, Jett's charge should have been deemed timely because undisputedly, her salary reduction occurred within the 300 day window of the charge filing date.

In other instances, some courts in the Eleventh Circuit and the Fifth Circuit continue to determine whether the continuing violation theory is applicable by employing a three factor analysis, which consists of whether the alleged discriminatory acts are related by subject matter, frequency and permanence. *Roberts v. Gadsden Memorial Hospital*, 835 F. 2d 793 (11th Cir. 1988), where the three factors were held not to be sufficiently present; See also *Cabiness v. YKK (USA), Inc.*, 859 F. Supp. 582, 586 (M.D. Ga. 1994), aff'd, 98 F. 3d 1354 (11th Cir. 1994).[6]

Several other circuits agree with the Fifth Circuit and the Eleventh Circuit that a three prong analysis is required to determine if a continuing violation has occurred. See *Robbins v. Jefferson County School District*, 186 F. 3d 1253, 1257 (10th Cir. 1999) (stating to determine whether the alleged acts of discrimination

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[6] The Eleventh Circuit adopted the Fifth Circuits' continuous violation doctrine. which employs the three prong analysis as set forth in *Berry v. Board of Supervisors of L.S.U.*, 715 F. 2d 971, 981 (5th Cir. 1983), cert. denied, ____ U.S. ____, 107 S. Ct. 232, 93 L. Ed. 2d 158 (1986).

constitute a continuing violation or are discrete unrelated acts we employ a three-factor inquiry: we consider: "(i) subject matter-whether the violations constitute the same type of discrimination; (ii) frequency; and (iii) permanence-whether the nature of the violations should trigger an employee's awareness of the need to assert her rights and whether the consequences of the act would continue even in the absence of a continuing intent to discriminate*); Rush v. Scott Specialty Gases, Inc.* , 113 F. 3d 476, 481 (3rd Cir. 1997) (stating we have followed *Berry v. Board of Supervisors of Louisiana State University*, 715 F. 2d 971 (5th Cir. 1983), the leading case on the continuing violation theory, where that court enumerated several factors relevant to the determination of whether a plaintiff has demonstrated a continuing violation).[7]

Other circuits continue to require a plaintiff to establish at a minimum, that one definable incident of discrimination occurred within the relevant filing period, to invoke the continuing violation theory. See *O'Loghlin v. County of Orange*, 229 F. 3d 871 (9th Cir. 2000) (stating with regards to an ADA violation, if a discriminatory act takes place within the limitations period and that act is "related and similar to" acts that took place outside the limitations period, all the related acts-including the earlier acts are actionable as part of a continuing violation), citing to *Anderson v. Reno*, 190 F. 3d 930, 936 (9th 1999); *Fielder v. UAL Corp.* 218 F. 3d 973, 987-88 (9th Cir. 2000) and *Draper v. Coeur Rochester, Inc.*, 147 F. 3d 1104, 1108-11 (9th Cir. 1998). In finding that the discrimination against *O'Loghlin* was continuous, the Ninth Circuit suggested that a logical and fair consequence of its application of the continuing violations doctrine is that a defendant cannot insulate itself from liability by engaging in a series of related violations of Title VII and then asserting that the statute of limitations has run for the first violation in the series. *O'Loghlin*, supra, 229 F. 3d 871 at 875.

Unlike the Eleventh Circuit, the Ninth Circuit opined that an important purpose of the continuing violation doctrine is to prevent a defendant from using its earlier illegal conduct to avoid liability for later illegal conduct of the same sort. *Id.* Under the Ninth

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[7] The Third Circuit agreed with the District Court's determination that Rush suffered from continuous sexual harassment, which consisted of derogatory remarks, rude behavior, and discriminatory conduct. *Rush v. Scott*, 113 F. 3d 476, 483 (3rd Cir. 1997).

Circuit's rationale, arguably Jett's claims of continuous discrimination would have survived and yielded different results because at least one act and the most recent act of discrimination complained of was within the relevant time period, as sanctioned by the Ninth Circuit.

Likewise, the Ninth Circuit further observed in *Draper, supra,* that a genuine issue of material fact existed as to whether the alleged hostile work environment continued into the relevant limitations period under the continuing violation doctrine, and thus precluded summary judgment on the claim. *Draper v. Coeur Rochester, Inc.*, 147 F. 3d at 1107. In reversing the District Court, the Court of Appeals, reiterated that events occurring outside of the limitations period may be considered as a basis for a discriminatory claim, if the events are part of an ongoing unlawful employment practice that continues into the relevant period of limitation. *Id.* at 1107. See also *Beall v. Abbott Laboratories*, 130 F. 3d 614, 621 (4th Cir. 1997) (stating the continuing violation theory is available only where an actual violation has occurred within the requisite time period); *Kline v. City of Kansas City*, 175 F. 3d 660 (8th Cir. 1999) (stating a violation is continuing if it consists of an ongoing pattern or practice of discrimination rather than an amalgamation of discrete, isolated instances); *Ashley v. Boyle's Famous Corned Beef*, 66 F. 3d 164 (8th Cir. 1995) (where the District Court's dismissal of gender discrimination and equal pay claims as time barred was reversed, stating that an employee may challenge ongoing discriminatory acts even if similar illegal acts could have been challenged earlier and are thus time barred).

Some other circuits recognize two types of continuing violations: systemic violations, which have their roots in a discriminatory policy or practice which continues into the limitation period and serial violations, which are composed of a number of discriminatory acts emanating from the same discriminatory animus, with each act constituting a separate wrong actionable under Title VII. *DeNovellis v. Shalala*, 124 F. 3d 298, 307 (1st Cir. 1997). See also *O'Rourke v. City of Providence*, 235 F. 3d 713, 731 (1st Cir. 2001), (stating continuous violation is an equitable exception for otherwise time-barred allegations but there must be some violation within the statute of limitations period that anchors the earlier claims). In *O'Rourke*, the First Circuit; reinstated the jury verdict and sanctioned the application of the serial continuing violation doctrine

to cover discriminatory activity and a hostile work environment that occurred two-and-one-half years prior to the charge of discrimination.[8] See also *Kovacevich v. Kent State University*, 224 F. 3d 806 (6th Cir. 2000) (stating two ways to establish continuing violations: first, if there is evidence of present discriminatory activity and if at least one of the forbidden discriminatory acts occurred within the relevant limitations period, and second, where a plaintiff has demonstrated a long standing and over-aching policy of discrimination).

Compare the Seventh Circuit, which observes three different continuing violation theories. *Place v. Abbott Laboratories*, 215 F. 3d 803 (7th Cir. 2000), stating "three types of continuing violations for purposes of employment discrimination include: where the exact day of the violation is difficult to pinpoint because employer's decision making process takes place over period of time; where the employer has a systematic, openly espoused policy alleged to be discriminatory; and where the employers discriminatory conduct is so covert that its discriminatory character is not immediately apparent. *Id.* at 808.

Many authors and other legal commentators have also discussed the split among the circuits regarding the necessary elements to invoke a continuing violation theory. See Lindemann and Grossman, Employment Discrimination Law, Third Edition, Volume II, *Continuing Violations*, pp. 1351-1363 (1996) stating "unquestionably the biggest area of disagreement and arguably the most muddled area in all of employment discrimination law is that of alleged continuing violation;" Philip J. Pfeiffer, *Continuing Violations*, Employment Discrimination Law," Third Edition, pp. 770-777 (2000), stating "cases addressing the continuing violations theory as an exception to the charge-filing limitations period continue to defy easy description or convenient categorization;" Lisa S. Tsai, *Continuing Confusion: The Application of the Continuing Violation Doctrine to Sexual Harassment Law*, 79 Tex. L. Rev. 531,

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[8] In O'Rourke, the First Circuit acknowledged its adoption of the three prong analysis first articulated by the Fifth Circuit in *Berry v. Board of Supervisors*, 715 F. 2d 971, 981 (5th Cir. 1983). In finding a "continuing violation" of sexual harassment, the First Circuit distinguished between the approach to cases involving a single act of permanence which would act as a trigger and those involving a series of acts, such as is generally found in sexual harassment cases. *Id.*

532, (2000), stating "[t]he courts of appeals have interpreted this seemingly straightforward doctrine in widely divergent ways, utilizing varying terminology and evaluative standards to adjudicate strikingly similar cases - ultimately resulting in widespread inconsistent application of the doctrine;" Robert J. Reid, Comments: *Confusion in the Sixth Circuit: The Application of the Continuing Violation Doctrine to Employment Discrimination*, University of Cincinnati, 60 U. Cin. L. Rev. 1335, 1345 (1992) stating "[t]he law of continuing violations remains in a state of confusion among the different circuits ... some further guidance from the United States Supreme Court ... could provide some much needed clarity on the question of continuing violations."

II. THE DECISION BELOW FAILS TO APPLY RULES OF THIS COURT AS FORMULATED IN UNITED AIRLINES, INC., v. EVANS AND ZIPES V. TRANS WORLD AIRLINE, INC.

The Eleventh Circuit's holding regarding the continuous violation theory as applied to the facts of this case, is in direct conflict with this Court's teachings in *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S. Ct. 1885, 52 L. Ed. 2d 571 (1977). In addition to the split in the circuits, this Court should accept this case for review because the Eleventh Circuit's decision below ignores the necessary inquiry mandated by this Court in *United Air Lines*, i.e., whether any present violations existed. Because Jett filed her charge against present violations as well as past violations, the Eleventh Circuit's holding below is inconsistent with *United Air Lines v. Evans*.

In *United Air Lines* this Court emphasized that allegations that a present system neutral in its operation, discriminates against victims of past discrimination is an essential component to invoke the continuing violation theory. *Id.* at 555. In this case, the School Board did not dispute that Jett had filed a timely charge of discrimination with regards to the current salary policy nor did it dispute that the policy adversely affected Jett and resulted in the diminution of her salary by approximately $5,000. Yet, the Eleventh Circuit refused to address the significance of the alleged current violation to Jett's claims of a continuing violation of discrimination against her. The Eleventh Circuit erred according to the dictates of

United Air Lines.

Likewise, the Eleventh Circuit's decision and that of other circuits cannot be reconciled with the teaching of the Supreme Court in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982), with regards to the overlapping of the statute of limitations question and the substantive law. There the Supreme Court recognized that the doctrines of equitable estoppel and equitable tolling excuse a claimant from having to file before it is feasible to do so, and further observed that a civil rights statute which provides for the judicial process to be initiated by lay persons, should be construed to maximize the likelihood that the claimant will receive the benefit of the law. *Id.* at 393-395, 102 S. Ct. at 1132-1133.

In following the Supreme Court's rationale, the First Circuit recently observed: [I]t would be anomalous to say that for statute of limitations purposes, a plaintiff should be on notice that she has a discrimination claim where the substantive law says she does not have such a claim yet. *O'Rourke v. City of Providence*, supra, 235 F. 3d at 732. The First Circuit also observed that where the substantive law does not resolve when a viable claim accrues, the issue of whether one is the victim of a continuing violation or not is better resolved by juries, with jurors reflecting the lessons from their own life's experiences. *Id.* at 732.

See also *Galloway v. General Motors*, 78 F. 3d 1164, 1166 (7th Cir. 1996), which followed the dictates of *Zipes* and in doing so stated that "we do not want to encourage premature or precipitate litigation." However, at least one other circuit does not appear to follow these principles, see *Merrill v. Southern Methodist University*, 806 F. 2d 600, 605 (5th Cir. 1986), where the Court held that the discriminatory act against the Professor occurred at the time she was denied tenure rather than when she first perceived that a discriminatory motive caused her to be denied tenure. *Id.* at 605.

While the Eleventh Circuit has indeed recognized that a limitations period may be suspended until the facts which would support a cause of action are apparent to a person with reasonably prudent regard for his rights, its holding in this case falls short of reinforcing its precedents or the Supreme Court's principle to the facts of this case. *Sturniolo v. Sheaffer, Eaton*, Inc., 15 F. 3d 1023 (11th Cir. 1994). This case involved a series of disputed facts, which included activities by the School Board, that arguably misled Jett

into believing her salary was secure. There were other indications from the School Board that it would eventually reassign her back to the duties and responsibilities of a secretary. Admittedly, the School Board had maintained her secretarial salary from year to year while assigning her menial tasks and the School Board also voted every year to continue her assignment of performing Teacher's Aide duties. The unrefuted record evidence established that Jett did not foresee and could not have foreseen that she would be demoted to a Teacher's Aide position, without cause, after having worked for over twenty-two (22) years with a good work record as a secretary.[9] Jett had no control over her employment status. The Defendant removed her from the District Office as a Secretary and the Defendant had the authority to move her back to a secretarial position at any time.

Additionally, the School Board's position before the District Court and the Eleventh Circuit supports Jett's decision that substantive law would not have supported the filing of a claim between the period she was supposedly on a lateral transfer and the time she suffered the actual demotion and salary reduction. On page 25 of its Initial Brief, the School Board argued in pertinent part:

> "[a] lateral transfer resulting in no loss of pay, benefits or classification does not generally constitute an adverse employment action. ... See generally *Doe*, 145 F. 3d at 1449-50. ... *Maniccia v. Brown*, 171 F. 3d 1364, 1370 n. 3(11th Cir. 1999) (noting that a lateral transfer with no loss of pay or benefits is not an adverse employment action); ... *Mantandon v. Farm and Indus.*, 116 F. 3d 355, 359(8th Cir. 1997) (finding allegedly retaliatory transfer not adverse because it did not entail change in position, title, salary or any other aspect of his employment, no matter "how[] unpalatable the prospect [of the transfer] may have been to [the employee]").

---

[9] At trial, Jett testified and her personnel file substantiated that, doing the years she worked as a Secretary she never received an adverse evaluation, while the School Board, without documentation tried to establish some deficiencies in her work as a secretary.

Hence, the panel's determination that Jett was unreasonable in relying on statements from two Superintendents for such a long period, ignored the substantive law and the facts of the case as well.

The law is well settled among some Circuits including the Eleventh Circuit, that when the facts are in dispute, a determination of when the statute of limitations begins to run is a question of fact for the jury. *Goldman v. Bequai*, 19 F. 3d 666, 305, U.S. App. D.C. 227 (1994); See also *Borden, Inc., v. Morton's Market, Inc.*, 120 F. 3d, *amended* in part 211 F. 3d 1224, (11th Cir. 1999), *cert. denied*, 120 S. Ct. 2006, 146 L. Ed. 956 (1999); *Bibeau v. Pacific Northwest Research Foundation, Inc.*, 188 F. 3d 1105, (9th Cir. 1999).

Since the facts surrounding Jett's initial transfer, continuous transfers, and ultimate demotion and salary reduction were in dispute, and substantive law did not require Jett to file a charge earlier than the one filed, the Court of Appeals' decision usurping the province of the jury and making a factual decision should be reviewed by this Court.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE PANEL'S REVERSAL OF THE JURY VERDICT ON THE GROUNDS THAT A PRIMA FACIE CASE WAS NOT ESTABLISHED, WITH REGARDS TO THE COMMISERATE SALARY POLICY IS INCONSISTENT WITH THE TEACHINGS OF THIS COURT AND WITH THE APPROACH OF OTHER CIRCUITS THAT CONSIDER THE TOTALITY OF THE EVIDENCE

This Court has clearly established that after a trial on the merits, an appellate court should not focus on the analysis of whether the elements of the prima facie case were established, but should assess the ultimate question of discrimination vel non- whether the defendant intentionally discriminated against the plaintiff. *United States Postal Service Board v. Aikens*, 460 U.S. 711, 714-715, 103 S. Ct. 1478, 1481-1482, 75 L. Ed. 2d 403 (1983).

In *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000), this Court also reversed the Fifth Circuit's reversal of a jury verdict on two grounds:

(1) the Fifth Circuit had ignored the Plaintiff's evidence which supported his prima facie case of age discrimination, and (2) the Fifth Circuit ignored the evidence which challenged the employers legitimate non-discriminatory reasons for his termination. *Reeves*, 147 L. Ed. 2d at 119. This Court held that a jury could rely solely on evidence of pretext to infer discrimination and further held that a prima facie case of discrimination combined with sufficient evidence for a reasonable fact finder to reject the legitimate non-discriminatory reasons, is adequate to sustain a finding of liability. *Id.* at 115, 121.

Secondly, this Court in *Reeves* addressed what a reviewing Court should consider upon an appeal of the denial of a Rule 50(b) motion. The Court concluded that the reviewing Court should review the record evidence and draw all reasonable inferences in favor of the nonmoving party, but, it may not make credibility determinations or weigh the evidence; credibility determinations, the weighing of the evidence, and drawing of legitimate inferences from the facts are jury functions, not those of a judge. *Id.* at 122.

In this case, the reviewing Court found that the Plaintiff had not established a prima facie case or established pretext, when the record in fact reveals that not only did similarly-situated whites not suffer a pay reduction from the policy in question but also that the Defendant exercised authority to adjust salaries commensurate with job duties and responsibilities prior to the adoption of the policy in 1994. Evidence that there were white employees who suffered demotion, but not salary reduction, established disparate treatment and therefore the Plaintiff's prima facie case. Likewise, evidence that the Defendant exercised the authority to adjust salaries before the effective date of the policy clearly cast doubt upon the Defendants "business necessity" reasons for adoption of the policy. Viewing all the evidence most favorable to Jett, a reasonable jury could believe that Jett was discriminated against and a reasonable jury found that Jett had been discriminated against. The jury weighed this evidence properly.

In *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993), this Court held that disbelief of the legitimate nondiscriminatory reasons set forth by the employer, coupled with the Plaintiff's prima facie case, is sufficient to permit the fact finder to infer discrimination and to support a jury finding of discrimination. *St. Mary's Honor Ctr.*, 509 U.S. at 508-11. Further, the Court observed that a Plaintiff is

entitled to survive summary judgment and judgment as a matter of law, when sufficient evidence exists to demonstrate the existence of a genuine issue of fact as to the truth of the employer's proffered reasons. *Id.* The Eleventh Circuit's panel decision in this case, contravenes this Courts clear directions in *St. Mary's Honor Ctr.* as well.

The Eleventh Circuit's holding is also in direct conflict with the recent holding of the Sixth Circuit in *Kovacevich v. Kent State University, supra, at* 224 F. 3d 806. In an almost identical procedural situation, the Sixth Circuit reversed the decision of the District Court, that had determined after a jury trial on the merits, that the claimant failed to establish a prima facie case on Title VII and Equal Protection Act claims. *Id.* at 822. There the Court held that as a matter of law the District Court erred and stressed that the teachings of *Aikens, supra,* with regards to the role played by the prima facie case apply to both district and appellate court reviews of verdicts, i.e. the totality of the evidence should be considered in a light most favorable to the plaintiff to determine if reasonable jurors could find discrimination. *Id.* at 827. The entry of judgment as a matter of law is always precluded once a Plaintiff has established a prima facie case and has shown sufficient evidence to allow a fact-finder to disbelieve an employer's proffered explanation for its actions. See also *Mitchell v. Baldridge*, 759 F. 2d, 80, 245 U.S. App. D.C. 60 (1985) (stating once a Title VII case has been fully tried on the merits, whether prima facie case was established is no longer relevant); *and Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F. 3d 581, 587 (5th Cir. 1998) (stating after a case has been fully tried on the merits, the inquiry of appellate courts becomes whether the record contains sufficient evidence to support the jury's conclusion).

The Eleventh Circuit's disregard for *Reeves* and *St. Mary's Honor Ctr.* as well as its conflict with the approach of other circuits, justifies the grant of certiorari to review the decision below that reversed the jury's decision.

CONCLUSION

For the foregoing reasons the petition for Writ of Certiorari should issue to review the judgment and opinion of the Eleventh Circuit Court of Appeals.

Respectfully Submitted,

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Counsel for Petitioner
850-224-3730
850-224-2202 Facsimile

Dated: June 11, 2001

IN THE
Supreme Court of the United States
October Term, 2001

No. _____

MARVIS JETT,
Petitioner,
vs.

WASHINGTON COUNTY SCHOOL BOARD,
Respondent.

APPENDIX "A"

Carolyn D. Cummings
FLORIDA BAR NO.: 0353442

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

MARVIS JETT,)
Plaintiff,)
vs.) **CASE NO. 5:99CV13-SPM**
)
WASHINGTON COUNTY SCHOOL)
BOARD,)
Defendant.)

AMENDED JUDGMENT

This action came before the Court and jury with United States District Judge Stephan P. Mickle presiding. The issues have been tried and the jury has rendered its verdict.

It is **ORDERED AND ADJUDGED** judgment is entered in favor of Plaintiff, MARVIS JETT, and against Defendant, **WASHINGTON COUNTY SCHOOL BOARD,** as set forth in the verdict awarding the Plaintiff, MARVIS JETT:

Total verdict amount: $134,000

Plaintiff is awarded pre-judgment interest based on an annual rate of 5.411% in a sum certain of $8,861.14 on the back pay and benefits award of $48,000 ($34,000 back pay and $14,000 benefits).

Post-judgment interest shall accrue at an annual rate of 5.411% upon the filing and entry of this judgment on the docket as provided by law.

ENTERED ON DOCKET 3/23/00 BY CG
(Rule 77 (d) FRCivP or 32(d)(1) & 63 FRCrP)
Copies mailed to: Cummings, Mabel

Plaintiff shall be reinstated to a position with pay equivalent to what she was making before her demotion, with all pay raises, changes in pay grade and benefits she would have received but for her demotion. The reinstatement shall take place upon the beginning of the pay period beginning on or about March 1, 2000.

Attorney's fees and costs are allowed as provided by law.

ROBERT A. MOSSING, CLERK

Date: February 25, 2000 Carolyn Hudson
Deputy Clerk

cc: Carolyn D. Cummings
Cummings, Hobbs & Wallace, P.A.
462 West Brevard Street
Tallahassee, Florida 32301

William R. Mabile, III
Fuller, Johnson & Farrell, P.A.
Post Office Box 1739
Tallahassee, Florida 32302-1739

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U. S. COURT OF APPEALS
ELEVENTH CIRCUIT
FEB 1, 2001
No. 00-11554 THOMAS K. KAHN
CLERK

D.C. Docket No. 99-00013-CV-5-SPM

MARVIS JETT,

Plaintiff- Appellee,

versus

WASHINGTON COUNTY SCHOOL BOARD,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

(February 1, 2001)

Before TJOFLAT and BIRCH, Circuit Judges, and VINING*, District Judge.

*Honorable Robert L. Vining, Jr., U. S. District Judge for the Northern District of Georgia, sitting by designation.

VINING, District Judge:

In this action, brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 **U.S.C.** ' 2000e, *et seq.*, the jury returned a verdict in favor of the plaintiff in the amount of$134,000.OO. The defendant appeals the district court's denial of its (1) motion for summary judgment, (2) motions for judgment as a matter of law, made at the close of the plaintiffs case and at the end of the trial, and (3) motion for new trial. Concluding that the plaintiffs claim with respect to her job transfers is barred because she failed to file a timely charge of discrimination and concluding that the plaintiff failed to make a prima facie case of discrimination with respect to the defendant's commensurate salary policy, this court reverses.

I. BACKGROUND

Marvis Jett was hired by the Washington County School Board ("Board") in 1967 and was the first black secretary to be employed in the District Office. In *1985,* Jett's supervisor retired, and his duties (property and textbook management) were reassigned to other district administrators. Four years later, in April 1989, Superintendent Kelly Brock called Jett into his office and told her that she was being transferred to the media center because the District Office had too many secretaries. When Jett threatened to file a discrimination complaint, since she was the only black secretary in the District Office and had more seniority than the other secretaries, Brock stated that he would laterally transfer her, allowing her to maintain her salary and job title.[1]

---

[1]Jett contends that she was transferred so that a white secretary, Sandra French, could have her job. The Board concedes that French took on some of the duties previously handled by Jeff but argues that Jett had not had those duties since 1985, when the duties had been dispersed to other secretaries.

Jett was extremely unhappy at the media center and complained on numerous occasions about how the other staffers there, two white females, treated her. In August 1990, Jett was transferred to Chipley High School, where she performed teacher's aide duties but was paid her higher secretarial salary and benefits. In 1992, Jett was again transferred, this time to Roulhac Middle School. Jett assisted with the In-School Suspension Program, performing the duties of a teacher's aide but retaining her secretarial salary and benefits.

In 1993, after giving public notice as required by Florida's Administrative Procedure Act, the Board adopted a policy whereby demoted employees would be paid salaries commensurate with their new positions. That policy stated: "Effective July 1, 1994 all employees who have been reassigned or who are reassigned (transferred) to a position with lower pay will be paid on the salary schedule commensurate with the position to which they are assigned" Phillip Roundtree, who was Chairman of the Board at the time of the trial, testified that the impetus behind his making this proposal was that a principal had been demoted to a classroom teacher position but was still retaining his principal's salary (approximately $10,000 more than he would have been entitled to as a classroom teacher). Roundtree testified that he thought it was unfair to pay a demoted person the same salary he received before being demoted. The policy affected everyone who had been demoted, including at least three white males. Jett was the only black person affected, and her annual salary was reduced by approximately $4600.00.

On July 27, 1994, Jett filed a charge of discrimination with the Florida Commission on Human Relations. The Commission found the charge to be without merit, and on July 14, 1998, the Equal Employment Opportunity Commission adopted the findings of the Florida Commission and issued a

right to sue letter to Jeff. On October 13, 1998, Jett filed suit in state court alleging that she had been discriminated against because of her race in violation of 42 U.S.C. § 2000e, *et.*;[2] on January 27, 1999, the Board removed the action to the United States District Court for the Northern District of Florida.

The Board filed a motion for summary judgment, which the district court denied. The case proceeded to trial. The Board moved for a directed verdict at the close of the plaintiffs case and again at the close of all the evidence.[3] Following a jury verdict in favor of Jett in the amount of $134,000 ($34,000 for back pay, $14,000 for lost benefits, and $86,000 for pain and suffering), the Board moved for judgment notwithstanding the verdict. The district court denied that motion and, likewise, denied the Board's motion for new trial. This appeal then followed.

II. STANDARD OF REVIEW

This court reviews de novo the denial of a motion for summary judgment, but the review is based upon all the evidence adduced in the district court, not simply the evidence before the court at the time it ruled on the motion. *Wenzel v. Boyles Galvanizing Co.*, 920 F.2d 778 (11th Cir. 1991). This court reviews de novo a district court's determination of a Rule *50(b)* motion. *See, e.g., Combs v. Plantation Patterns,* 106 F.3d1519,1526(11th Cir.1997). In doing so, "we must consider all the evidence in the light most favorable to [the nonmovant] and determine'whether or not reasonable jurors could have concluded as this jury did based on the evidence presented."' *Id.*

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[2]Jett also asserted other claims but those were subsequently dismissed and were not pursued either at trial or on appeal.

[3]Although counsel used the terms "directed verdict" and, later, "judgment notwithstanding the verdict," these motions are now termed "judgment as a matter of law." *See* Rule *50,* Federal Rules of Civil Procedure.

(quoting Quick v. Peoples Bank, 993 F.2d 793, 797 (11th Cir. 1993)).

III. DISCUSSION

Ordinarily, a charging party must file a claim with the Equal Employment Opportunity Commission within 180 days of the alleged unlawful activity. However, if the charging party has instituted proceedings with a state agency authorized to address the alleged unlawful activity, the charging party is given 300 days from the date of the activity to file the claim. 42 U.S.C. § 2000e-5(e). This time requirement, since it is not jurisdictional, may be tolled under certain circumstances. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 102 S.Ct. 1127 (1982). In the instant case, it is undisputed that Jett filed her charge more than 300 days after her demotion and transfers occurred. Therefore, unless the 300-day period is tolled, Jett's claims of discrimination with respect to her demotion and transfers are time barred.

The limitations period does not begin to run "until the facts which would support a charge of discrimination are apparent or should be apparent to a person with a reasonably prudent regard for his rights." *Sturniolo v. Sheaffer, Eaton, Inc.*, 15 F.3d 1023, 1025 (11th Cir. 1994). Nevertheless, "a plaintiff who is aware that she is being replaced in a position she believes she is able to handle by a person outside the protected... group knows enough to support filing a claim." *Blumberg v. HCA Management Co.*, 848 F.2d 642, 645 (11th Cir. 1988). The limitations period is also tolled during the time that an employer actively misleads an employee with false promises of another position, i.e., the period is equitably tolled "until such time as it is or should be apparent to an employee with a reasonably prudent regard for his rights that the employer has ceased to actively pursue such a position." *Cocke v. Merrill Lynch & Co.*, 817 F.2d *1559*, 1561 (11th Cir. 1987).

In the instant case, Sandra French began working in the District Office within a very short time after Jett's initial transfer, in 1989. Furthermore, left does not contend that she was unaware of French's employment at the District Office during this period of time. Thus, this case is unlike *Sturniolo,* where the plaintiff, who had been told that his position was being eliminated in an effort to consolidate sales territories, later learned that his sales territory had not been eliminated and that, in fact, a younger person had been hired to replace him. The plaintiffs charge, filed within 180 days of learning about the replacement, was considered timely. "The date when Sturniolo knew or should have known that Sheaffer had hired a younger individual to replace him is the date upon which the tolling period should commence." *Sturniolo,* 15 F.3d at 1026.

Jett also contends that the decision not to reduce her salary in 1989 was designed to prevent her from filing a complaint of discrimination. Even if that were the effect of the decision, such action did not *prevent* Jeff from filing a charge of discrimination. The fact that Jett backed off from her threat to file a charge of discrimination after being allowed to keep her salary in no way means that she was misled about her legal rights or her ability to file a charge.

As a final matter Jeff argues that Brock's repeated statements that he would consider her for a secretarial position in the District Office if an opening occurred should also toll the limitations period. Even assuming that the statements were couched in such affirmative tones that Jeff would have been misled about the Board's intention not to return her to a secretarial position, this court concludes that it would not have taken a reasonably prudent person more than two years to ascertain that the statements were false. Jeff was initially transferred in 1989 but did not file a charge of discrimination until 1994. For Jett to have relied upon statements by Brock and Superintendent Bill Williams for such a long period of time was inherently unreasonable. This court determines that

the limitations period was not tolled for this entire period and that charge filed on July 27, 1994, was untimely with respect to Jeff's demotion and transfers.

The court now turns to the commensurate salary policy, adopted by the Board effective as of July 1, 1994. That policy required that "all employees" who had been demoted or transferred be paid commensurate with the position to which they had been demoted or transferred.

To present a prima facie case of race discrimination based upon circumstantial evidence and alleging disparate treatment, a plaintiff must utilize the framework set out *in McDonnell Douglas Corp. v. Green,* 411 U.S. 792,93 S.Ct. 1817 (1973). She must show that (1) she belongs to a racial minority, (2) she was subjected to adverse employment action, (3) her employer treated similarly situated employees outside her racial classification more favorably, and (4) she was qualified for the job. *See Holjfield v. Reno,* 115 F.3d 1555 (llthCir. 1997).

Even assuming that Jett met the other requirements, this court finds that she failed to show that the Board treated similarly situated employees differently. Jett offered no evidence that similarly situated white employees were not affected by this policy. Indeed, Jett testified that of the persons who suffered pay cuts in 1994 as a result of the policy, she was the only black person affected; all the others were white. (Trial Transcript, Vol. I, p. 129). Thus, the evidence clearly showed that the policy was applied to all employees of the Board and that blacks and whites were treated identically under the policy. The district judge erred in holding that Jeff had proven the elements of a prima facie case.

Even if Jett had proven the elements of a prima facie case, the district judge was still required to grant summary judgment (or, later, judgment as a matter of law) on Jett's commensurate salary claim since the Board articulated a legitimate nondiscriminatory reason for its adoption of the policy and

Jett did not show that the reason was pretextual.[4] Dr. Beverly Helms, Director of Administrative Services of the Washington County School Board, and Phillip Roundtree, a Board member, both testified that the school system was experiencing financial problems and that the impetus behind adoption of the policy was to stop paying demoted employees salaries that were higher than those salaries being paid to others doing the same work. Trial Transcript, Vol. II, pp. 13 1-137, 147-152. Jeff presented no evidence to show that these reasons were pretextual.

IV. SUMMARY

Because Jett failed to file a timely charge of discrimination with respect to her job transfers and because she failed to show the Board's commensurate salary policy was the product of discriminatory animus, the judgment of the district court is

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[4]Once a plaintiff presents a prima facie case of racial discrimination, the burden then shifts to the defendant to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Lee v. GTE Florida, Inc.*, 226 F.3d 1249, 1253 (11th Cir. 2000). "To satisfy this intermediate burden, the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." *Texas Department of Community Affairs v. Burdine*, 450 U.s. 248, 257, 101 5.Ct. 1089, 1096 (1981). If the employer meets this burden of production, the plaintiff must then establish that the defendant's proffered reasons for the action it took were pretextual. *Lee*, 226 F.3d at 1253.

REVERSED and the case is REMANDED with instructions that Jett's claims be dismissed with prejudice.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-11554-DD

MARVIS JETT,

Plaintiff-Appellee

versus

WASHINGTON COUNTY SCHOOL BOARD,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Florida

---

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion_____, 11th Cir., 19_, _____F.2d_____)

Before: TJOFLAT and BIRCH, Circuit Judges, and VINING*, District Judge

PER CURIAM:
The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Bane are

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

DENIED.

*Honorable Robert L. Vining, Jr., U.S. District Judge for the Northern District of Georgia, sitting by designation.

United States Code, Title 42: Section 2000e-5(e), Page 556-557 (1997 Ed.).

(e) Time for filing charges; time for service of notice of charge on respondent filing of charge by Commission with State or local agency; seniority

(1) A charge under this section shall be flied within one hundred and eighty days alter the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge Is made within ten days thereafter, except that In a case of an unlawful employment practice with respect to which the person aggrieved has Initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days alter the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system Is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved Is injured by the application of the seniority system or provision of the system.

United States Code, Title 42: Section 2000e-2(a), Page 546 (1997 Ed.).

§2000e-2. Unlawful employment practice.

(a) Employer practice.

It shall be an unlawful employment practice for an employer-

(1) to fall or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

A-16

Washington County
District School Board
206 N. 3rd Street
Chipley, Florida 32428

June 2, 1994

Bill Williams
Superintendent of Schools
(904) 638-6222
Fax (904) 638-6226

Ms. Marvis Jett
518 Church Street
Chipley, Florida 32428

Dear Marvis:

This is to confirm our discussion of June 1, 1994. The School Board has approved your employment for 1994-95 as an aide. You are assigned to Roulhac Middle School. As I indicated to you in our meeting, the policy that was approved by the Board on July 12, 1993 says that effective July 1, 1994, all employees who have been re-assigned or who are assigned to a position with lower pay will be paid on the salary schedule commensurate with the position to which they are assigned.

This means that 1) you will no longer receive pay as a school secretary; 2) you will not earn annual leave; 3) you will be employed on a one hundred ninety six (196) day contract on the aide salary schedule; and 4) you will be paid for your annual leave accrued and not used as of June 30, 1994. Our, records reflect that you will have 2168 days annual leave as of June 30, if you have not used or do not use any

additional days beyond those we have on file at the district office. You will receive pay for these, consistent with School Board Policy rather than being allowed to continue to use them at your's and the Principal's discretion.

I am attaching a copy of the board policies and procedures that apply to your situation. I have highlighted the information that I have referenced.

At the June 20 School Board meeting I will recommend that you be employed at Chipley High School for the month of July to assist in the summer school program. Mr. Pat Williams will make your specific assignment and will supervise you.

Feel free to contact me if you have any questions.

Sincerely,

Bill Williams, Superintendent
WASHINGTON COUNTY SCHOOLS

CC: School Board Members
Pat Williams, Principal - Chipley High
Calvin Stevenson, Principal - Roulhac Middle